IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY PETITION No 4 of 2002

WITH

COMPANY PETITION No 5 of 2002

For Approval and Signature:

HON'BLE MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

AMBICA TRADING CO.

Versus

SHREE BANSIDHAR PVT. LTD.

Appearance:

1. COMPANY PETITION No. 4 & 5 of 2002

MR ANSHIN H DESAI for Petitioner No. 1

MR ASHOK L SHAH for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE K.A.PUJ

Date of decision: 02/08/2004

COMMON ORAL JUDGEMENT

Both these petitions are filed under Section 433 (e) read with Section 434 of the Companies Act, 1956 for winding up of the respondent Company, namely, M/s. Shree Bansidhar Pvt. Ltd. Since the respondent Company is same in both the petitions and subject matter of both the petitions are also same, they are being disposed of by common order.

2. In Company Petition No. 4 of 2002, it is the case of the petitioner that the petitioner has been carrying on the business of dealing in various items of fabrics and other miscellaneous items and used to send clothes to the Company for processing and regular bills for the same were issued on account of this and timely payments were also received. The petitioner used to give to the Company a large amount of money in advance and the bills issued by the Company for processing charges were being adjusted against the said advance. After clearing all the bills raised by the Company for claiming processing charges out of the amount paid in advance, the Company was liable to pay an amount of Rs. 2,48,858.94ps. After closure of the business transactions between the petitioner and the Company, an amount of Rs. 2,48,858.94ps. was payable by the Company to the petitioner at the end of the financial year 1988-89. The petitioner had been repeatedly requesting for the payment of the aforesaid amount but the Company did not make the payment. The petitioner was, therefore, entitled to recover the said amount from the Company along with interest at the rate of 18% and the said amount with interest calculated till 31.12.2001 has come to Rs. 20,58,416.22.

3. It is the case of the petitioner that in the balance sheet of the Company for the year 1988-89, the Company has shown a list of sundry creditors wherein at Ledger Folio 480 of Sundry Creditors, the name of the petitioner was shown and the amount outstanding which was payable by the Company to the petitioner was Rs. 2,48,858.94. Similarly, in the balance amount as on 31.03.1990, the petitioner's name was shown at L.F. No. 208 and it has been acknowledged that the Company was liable to pay to the petitioner an amount of Rs. 2,48,858.94.

4. In Company Petition No. 5 of 2002, it is the case of the petitioner that the Company used to purchase various kinds of goods from the petitioner from time to time and regular bills relating thereto were being issued to the Company. The amount of such bills used to be debited in the account of the Company in the Books of

Accounts regularly maintained by the petitioner. The payment received against the said amount from the Company used to be credited in the said account. The interest rate at the rate of 18% p.a. was payable on the amount that remained outstanding from time to time. The petitioner had lastly received the part payment from the Company in the year 1988 - 89 leaving balance sum of Rs. 3,81,959.39ps. on which interest at the aforesaid rate of 18% was payable to the petitioner as per the condition mentioned in the invoices issued to the Company. The aggregate total amount along with interest till 31.12.2001 has come to Rs. 31,59,345.63ps.

5. In this case also, in Financial Year 1988 - 89, the opening balance was Rs.26,049.66ps. and the petitioner had sold goods to the Company for an aggregate value of Rs. 4,29,800.25 against which the Company has made the payment of Rs. 73,890.52 leaving the balance of Rs. 3,81,959.39. Similarly, in the balance sheet of the Company for the year ending on 31.03.1990, as well as on 31.03.1991, the petitioner's name was shown in the Ledger Folio No. 172 and 150 respectively and it has been acknowledged that the Company is liable to pay to the petitioner an amount of Rs. 3,81,959.39.

6. Mr. Anshin H. Desai, learned advocate appearing for the petitioners in both the petitions has submitted that in the year 1987 - 88, the Company had made a reference to the Board for Industrial and Financial Reconstruction under the Provisions of Sick Industrial Companies (Special Provisions) Act, 1985 on the ground that it had become a sick Company under the said Act in view of the losses suffered by it from time to time. By an order dated 06.11.1990 made in Case No. 247 of 1987, the BIFR had framed a Scheme for the revival of the Company. The said scheme was under implementation till the financial year 1998 - 99 ending on 31.03.1999. Under Section 22 of the SICA, during the period when the said reference was pending with BIFR and till the said scheme was under implementation i.e. from the date when the said reference was registered by BIFR and till 31.03.1999, the claim of the petitioners against the Company for their respective amounts remained suspended and no proceeding for the payment of the said amount as also for winding up of the Company for its failure to pay the same could lie under the law. It was only after the said date of 31.03.1999, till when the said scheme was under implementation that the Creditors of the Company were entitled to take such steps for payment of their dues or otherwise as are permissible. As per the provisions contained in Sub-section (5) of Section 22 of

the Act, the period during which a creditor is prevented from taking any steps for the payment for his dues because of the above provisions, is excluded from the computation of the period of limitation. Since at the time of the order passed by BIFR and thereafter, the Company has managed its liability to pay the amount stated above to the petitioner and since the claim of the petitioners was suspended till 31.03.1999, the claim of the petitioners is not barred by the law of limitation.

7. Mr. Desai has further submitted that after 31.03.1999, the petitioners have repeatedly made request to make the payment of their outstanding dues. Both the petitioners have sent the statutory notice on 26.11.2001 which were duly received by the respondent Company and evasive replies were sent by the respondent Company. Despite the service of notice, no payment has been made by the respondent Company to the petitioners. Mr. Desai has further submitted that as per the scheme of BIFR, net worth of the Company at the end of the year 1998 - 99 ought to have been Rs. 1.04 Crores while in reality, it was Rs. 8.67 Lakhs. The projected net worth of the Company at the end of the year 1999 - 2000 should have been Rs. 1.18 Crores whereas in reality, it is Rs. (-9.68) Lakhs. He has, therefore, submitted that the substratum of the Company is totally lost and its losses far outweigh its capital and its share capital is completely wiped out. The Company is not carrying on any business for which it was formed and registered. There are no prospects of its carrying on any business at even distant future. The respondent Company is in insolvent circumstances and cannot pay its debts as and when they become due and payable. As per the scheme of BIFR, the Company was not allowed to sell any further assets without the prior approval of BIFR, Banks and financial institution. Despite this, the Company has sold the land at Kamod in 1994 and 1997 which was given by the Gujarat Government to the Company specifically for the purpose of starting a dyestuff industry to develop the said area. The said land was given to the Company by the State Government on certain conditions. If these conditions were violated, the Collector had a right to take back the said land from the Company. In breach of these conditions, the management of the respondent Company has already disposed of its assets without prior permission of BIFR and is still in the process of disposing of the other assets of the Company. Mr. Desai has, therefore, submitted that the respondent Company is required to be wound up.

8. This Court has issued notice on 11.01.2002 and

restrained the respondent Company from transferring any immoveable properties or plant and machinery of the Company to any party. The Court has also made it clear that if the respondent Company is not carrying on any manufacturing or trading operations, till the next date, the respondent would not deal with the sale proceeds received for the disposal of the properties, except for the purpose of maintenance of the properties and for payment of staff salary.

9. The matter was thereafter adjourned from time to time and in between terms of settlement were also going on. The interim relief granted by this Court has continued all through out and since the terms of settlement failed, both the petitions are taken up for further hearing.

10. Mr. Ashok L. Shah, learned advocate appearing for the respondent Company in both the petitions has submitted that the petitioners are not entitled to the amount which they have claimed in the present petitions. The petitioners are not entitled to interest at the rate of 18% p.a. or at any other rate at all as claimed or otherwise. He has further submitted that since the Company was before BIFR and scheme of rehabilitation was sanctioned by BIFR, it has a binding effect on all persons covered by the Scheme and from the date of coming into operation of the sanctioned scheme, it is binding on the Company, its shareholders, creditors and all others concerned. He has further submitted that any right, if at all, that the petitioners had as Creditors of the Company was modified by the terms and conditions of the said sanctioned scheme. As per the terms of the sanctioned scheme, no interest was to be paid. Creditors for goods had to make sacrifice also and all creditors of the total value of Rs. 23,43,000/- which included the claim of the present petitioners, were to waive their claims for a total amount of Rs. 3,00,000/- and the total amount to be paid to unsecured creditors of the total value of Rs. 23,43,000/- was only Rs. 20,43,000/-. He has further submitted that the scheme also provided that the creditors for goods and other creditors are to be paid their dues after taking into account the waiver of the amount, over the years from the future profits of the Company. Even if the petitioner has any claim against the respondent Company, the respondent Company is bound to pay the same if and only if it makes profits and only from out of the future profits that the petitioner might be entitled to receive payment of its alleged dues. He has, therefore, submitted that the respondent Company is not at present

making any profits and hence, no amount is payable by the Company to the petitioners.

11. Mr. Shah has further submitted that the file of the respondent Company was closed by BIFR by its order and judgment dated 08.01.1996. From the said date, no reference of the respondent Company remained before BIFR and there was no reference pending after 08.01.1996. If the petitioner wanted to initiate any action against the respondent Company, it ought to have initiated the same within three years from 08.01.1996. Since the petitioners have filed the present petitions in January 2002, the petitioners' claim are clearly barred by law of limitation. None of these petitions is maintainable.

12. Mr. Shah has further submitted that after the reference was filed and registered with the BIFR in 1987, a Management Committee was formed on 27.09.1988 by the board of Directors of the Company to manage the day to day business and affairs of the Company. Shri Saileshbhai Patwari, the sole proprietor of both the petitioner firms, was one of the members of the said Management Committee. The said Management Committee, inclusive of the proprietor of the petitioner firms was to function for a period of three years and was not to be changed under any circumstances. It was under the guidance of this Management Committee that the scheme for rehabilitation of the respondent Company was presented to the BIFR and which scheme was sanctioned by BIFR by its order dated 06.11.1990. Mr. Shah has, therefore, submitted that the proprietor of the petitioner firms thus very much a party to the said scheme which did not provide for payment of any interest and which provided for payment of dues of unsecured creditors for goods only from out of future profits of the Company. Though the proprietor of the petitioner firms was well aware of all these facts, the petitioners have raised their claims, including claim for interest, with ulterior motives and only with a view to pressurise the Company and to create prejudice against the respondent Company.

13. Mr. Shah has further submitted that if there is any grievance against the implementation of the scheme, it is only BIFR which has a power and authority to review and monitor periodically the implementation of the sanctioned Scheme. The petitioners should have, therefore, approached the BIFR under the Provisions of the Act and BIFR alone is empowered and authorised to monitor the implementation of the sanctioned Scheme. He has further submitted that this Court has no jurisdiction whatsoever to deal with the petition for winding up of

the respondent Company by invoking the provisions contained in Section 433 (e) read with Section 434 of the Companies Act, 1956 and hence, both the petitions are required to be dismissed with cost.

14. The Court has heard the learned advocates appearing for the respective parties at length. The Court has also gone through the memo of petition, documents attached therewith as well as reply filed by the respondent Company in both the petitions. The documents produced on record are also perused. Before dealing with the rival contentions, a close look at the relevant statutory provisions contained in Sick Industrial Companies (Special Provisions), Act is necessary. There is no dispute about the fact that as on 31.03.1989, the petitioners in Company Petition Nos. 4 & 5 of 2002 shown as Creditors for a sum of Rs. 2,48,858.94ps. and Rs. 3,81,959.30ps respectively. There is also no dispute about the fact that the Company had made a reference to the BIFR in the year 1987 - 88 and the BIFR had framed scheme for revival of the Company by an order dated 06.11.1990. There is also no dispute about the fact that the said scheme was under implementation till the financial year 1998 - 99 i.e. upto 31.03.1999. It is also an admitted position that the BIFR has closed the case of the respondent Company on 08.01.1996 by passing a speaking order to that effect. In the above factual background, Section 22 (1) of the Act needs to be taken cognizance of. It reads as under :-

"Where in respect of an industrial company, an inquiry under section 16 is pending or any scheme referred to under section 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal under section 25 relating to an industrial company is pending, then, notwithstanding anything contained in the Companies Act, 1956 (1 of 1956) or any other law or the memorandum and articles of association of the industrial company or any other instrument having effect under the said Act or other law, no proceedings for the winding-up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof (and no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans, or advance granted to the industrial company) shall lie or

be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority."

15. The plain reading of the above Section makes it clear that for its application, it must be shown that either an inquiry under Section 16 was pending or scheme referred to under Section 17 was under preparation or consideration or a sanctioned scheme was under implementation. During this period, no proceeding for winding up of the industrial Company or for execution of distress or like against any of the properties of the industrial Company or for the appointment of receiver in respect thereof would lie or be proceeded with further. Since the scheme was under implementation till 31.03.1999, there is no question of initiation of any proceedings against the Company till 31.03.1999. Sub-Section (5) of Section 22 says that "In computing the period of limitation for enforcement of any right, privilege, obligation or liability, the period during which it or the remedy for the enforcement thereof remains suspended under this section shall be excluded." In view of this statutory provision, the period during which the reference was pending before BIFR and till the scheme framed by the BIFR was under implementation i.e. 31.03.1999, is required to be excluded. Mr. Shah's contention that since the case of the respondent Company was closed by BIFR on 08.01.1996, the period of limitation would start from that date, does not prima facie seem to be in conformity with the statutory provision as admittedly, the scheme was under implementation till 31.03.1999.

16. As far as the other submission of Mr. Shah that as per the scheme of BIFR, the petitioners are entitled to their claim only out of the future profits and since the Company has not earned any profit, they are not entitled to recover any amount from the respondent Company is concerned, this is an arguable point as to whether the future profit which was envisaged under the scheme was during the implementation of the scheme or even thereafter. The implementation of the scheme was upto the period of 31.03.1999 and since the figures were projected upto this period, the Company was supposed to earn the profit during this period out of which the Creditors were required to be paid. In the Scheme itself, there are different statements regarding projected performance and profitability, projected Balance-sheet, projected fund flaw and statement etc. and Creditors for goods were to be paid on or before

31.03.1999. If the Company was not in a position to pay their Creditors on or before 31.03.1999, the Creditors have every right to take appropriate legal actions against the respondent Company. For that purpose, they are not supposed to wait till the Company earns any profit in future. In a given case, even when the period of implementation of the Scheme is over, the Company would not be in a position to earn any profit, but in that case, the Creditors would not lose their right to take any legal action against the Company. It is, therefore, not correct to state that the petitions are not maintainable either on the ground of bar of limitation or on the ground of non-earning of profits by the Company which may disentitle the petitioners to move winding up petitions before this Court.

17. The Court is, however, of the view that the claims made by the petitioners in the present petitions are, inter alia, inclusive of very substantial amount of interest and it is rather 7 to 8 times more than the principle amount which cannot be entertained or adjudicated upon in the winding up petitions as there are disputes with regard to interest whether it is chargeable and even if it is chargeable at what rate. It is also a debatable issue as to whether the petitioners are entitled to interest during the period of implementation of the Scheme or whether Scheme provides for payment of interest. Even with regard to the principal amount, the respondent Company has denied its liability in the affidavit in reply and Mr. Shah has submitted during the course of his arguments that the proprietor of both the petitioner Firms was a member of the Managing Committee formed by the Board of Directors to run the Company. There was every possibility that he must have received the amount which was due and payable to his respective proprietary firms. This also requires recording of evidence and this Court will not go into the factual aspects of the matter. The Court has formed the prima facie opinion with regard to the period of limitation as well as the operation and implementation of the scheme with special reference to future profit vis-a-vis the claim of the petitioner. It, however, requires detailed scrutiny of facts and leading of evidence which is not possible in the present winding up proceedings. The Court has, therefore, only considered in the present proceedings the defence raised by the respondent Company. In this connection, the broad principles laid down by this Court in the case of FICOM ORGANICS LIMITED V/S. LAFFANS PETROCHEMICALS LIMITED, 1998 (5) COMPANY LAW JOURNAL 24 (GUJARAT) are required to be gone into. The Court has to see as to whether the defence raised by the

respondent Company is a bonafide defence or not.

18. From the respective pleadings and arguments of the parties, the Court is of the view that the petitioners' cases fall in the grey area i.e. Company's defence is neither found to be substantial nor a moonshine and, therefore, the Court is not in a position even tentatively to give a finding one way or the other. The Court is, therefore, of the view that the petitioners should approach to the Civil Court. However, the respondent Company is also required to put on condition. The Court, therefore, directs the respondent Company to deposit a sum of Rs. 1 Lacs and Rs. 1.5 Lacs towards the dues of the petitioners respectively in these two petitions in this Court within a period of eight weeks from today and leaves it open for the petitioners to prove their claims before the Civil Court to which the amount deposited in the Court would be transferred. It is, however, made clear that if the amount is not deposited as directed above, the petitions would automatically be revived and required to be admitted and advertised. In case of failure on the part of the respondent Company to deposit the amount, the petitioners are entitled to file note before this Court for getting the order of admission and advertisement.

19. If the petitioners want to file Civil Suits against the respondent Company, the same may be filed within three months from the date of receipt of the intimation with regard to deposit of the amount by the respondent Company before this Court and if the suits are not filed within this period, the respondent Company will be entitled to withdraw the said amount from the Court.

20. The Court adopts this course because of the fact that the Company in other two petitions filed in this Court by the Unsecured Creditors has agreed to pay the principal amount with 10% interest p.a. from 01.04.1999 till the date of payment. Of course, it was an order based on consensus and it cannot be sited as a precedent. It however, certainly weighs with the Court while considering the defence of the Company.

21. Before parting, it may not be out of place to clarify here that any opinion expressed or observation made is of prima facie nature and it would not come in the way of any parties in the suit that may be filed and the Civil Court will decide it on merits and in accordance with law.

22. With the aforesaid observations and directions, both these petitions are accordingly disposed of without any order as to costs.

Sd/-

[K.A. PUJ, J.]

#Savariya#

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